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In the Supreme Court of the United States

OCTOBER TERM, 1961

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

FLORIDA CITRUS CANNERS COOPERATIVE,

Respondent.

BRIEF OF RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 972

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

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FLORIDA CITRUS CANNERS COOPERATIVE,

Respondent.

BRIEF OF RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondent files this Brief in opposition to the Solicitor General's Petition for a Writ of Certiorari to review the Judgment of the Court of Appeals for the Fifth Circuit entered in this case on March 27, 1961.

OPINION BELOW

The Decision of the Court of Appeals is reported at 288 F. 2d 630.

QUESTION PRESENTED

Under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are the United States Courts of Appeals precluded from setting aside credibility determinations of Trial Examiners?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, are as follows:

"Section 10.

"(e) The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *"

ARGUMENT

The Respondent contends that this Court should not grant a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case.

Initially, the Petitioner in its Petition (p. 13) even admits that "Standing alone, this patent departure from accepted principles might not be sufficient to invoke this Court's supervisory powers." The Petitioner then argues that the instant case and another case (*N.L.R.B. v. Walton Manufacturing Co.*, No. 878, this Term, pending on Petition for a Writ of Certiorari) are so similar in their alleged errors below that this case should also be reviewed along with the *Walton* case.

Respondent submits that for writ purposes, each case must stand on its own feet, especially where there is no connection between the two cases compared. It is to be noted that in the *Walton* case, the Petitioner complains about the Fifth Circuit's methods of reviewing Section 8(a)(3) discrimination findings of the Board. And now in the instant case, the Petitioner complains about the Fifth Circuit's methods of reviewing cases wherein credibility determinations of the Trial Examiner and Board are set aside. The Petitioner fills the gap by stating "The decision here, like that in No. 878, reflects a continuing misconception on the part of the court below as to its reviewing function."

Respondent submits that the instant Petition should be denied if for no other reason than that the Petition is improper in its premise.

Respondent would further contend that no proper cause exists for this Court to grant the writ Petitioner seeks. In

the instant Petition (p. 2) the Petitioner states the question presented is:

> "Whether the court of appeals 'grossly misapplied' the standard of review laid down in *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474, 191, 196, in reversing the Board's findings of fact because it disagreed with the Trial Examiner and the Board concerning the credibility of the witnesses."

The quote "grossly misapplied", *supra*, is from the heart of the *Universal Camera* case where this Court through Mr. Justice Frankfurter (all justices concurring on this language) stated:

> "We conclude, therefore, the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.
>
> "From this it follows that enactment of these statutes does not require every court of appeals to alter its practice. Some — perhaps a majority — have always applied the attitude reflected in this legislation. To explore whether a particular court should or should not altar its practice would only divert attention from the

application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. *This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.*" (Emphasis added) 340 U. S. at 490.

The Petitioner apparently feels that it is a violation of the *Universal Camera* standard for a Court of Appeals to set aside a credibility determination presented to it by the Trial Examiner and adopted by the Board. And yet, nowhere in its argument does the Petitioner point to any proscription in that decision or any other which excludes the area of credibility from the reviewing scope of the court below. The Petitioner seems to have construed the *Universal Camera* case as setting out the scope of review allowed to Courts of Appeals. If anything, it is submitted that that was what this Court specifically and judiciously avoided doing. Instead, a standard of review was expressed, which standard was previously enacted by the Congress in Section 10(e) of the Act. If it were the intent of Congress to exclude credibility determinations from the reviewing scope of the Courts of Appeals, surely Congress would have spoken or this Court would have judged such a denial in the *Universal Camera* case or in *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U. S. 498 (1951).

The next question is apparent: when are the findings of the Board with respect to questions of fact supported by substantial evidence on the record considered as a whole and when are such findings not so supported? The question is,

of course, paramount in every petition for the enforcement of a Board order the Petitioner brings to the Courts of Appeals.

The Respondent submits that the findings of the Board with respect to questions of fact are not supported by substantial evidence on the record considered as a whole when, "* * * although there is evidence to support [them], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum Company*, 333 U. S. 364, 395 (1947).

The Respondent asserts that the standard of review laid down in *Universal Camera* most assuredly gives the Courts of Appeals the right to set aside credibility determinations if it is of the definite and firm conviction that a mistake has been made. Indeed, if it did not, that Court would have in effect no power of review at all in a great number of cases where the Trial Examiner and Board credits all of the General Counsel's witnesses and none of respondent's. In the *Universal Camera* case, this Court in comparing the reviewing power of appellate courts under the National Labor Relations Act, with the reviewing power of a trial court sitting without a jury as to a master's findings pursuant to Rule 53(e)(2) of the Federal Rules of Civil Procedure, stated:

> "We are aware that to give the examiner's findings less finality than a master's and yet entitle them to consideration in striking the account, is to introduce another and an unruly factor into the judgmatical process of review. But we ought not to fashion an exclusionary rule merely to reduce the number of imponderables to be considered by reviewing courts." 340 U. S. at 493.

This Court therefore stated that appellate courts reviewing findings by Trial Examiners under the test "The findings of the Board with respect to questions of fact if supported by

substantial evidence on the record considered as a whole shall be conclusive", have broader authority to delve into the basis and evidence in support of the Examiner's findings than would a trial court sitting without a jury reviewing the findings of masters pursuant to the "clearly erroneous" rule set forth in Rule 53(e)(2) of the Federal Rules of Civil Procedure.

In *United States v. U. S. Gypsum Company, supra*, this Court in discussing the power of review of appellate courts in regard to findings made by a trial court sitting without a jury under the "clearly erroneous" test pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, stated:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of a trial court, when dependent upon oral testimony where the candor and credibility of witnesses would best be judged, had great weight with the appellate court. *The findings were never conclusive, however.* A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm convicition that a mistake had been committed." (Emphasis added). 333 U. S. at 395.

That the court below was "left with the definite and firm conviction that a mistake [had] been committed" is patent from a reading of its opinion.

Respondent submits that there is little if any distinction between the "clearly erroneous" test set forth in Rule 52(a) and 53(e)(2). It would follow, *a fortiori*, that if reviewing courts have the power to set aside credibility determinations under the "clearly erroneous" rule, they must also have at least that power under the test "substantial evidence on the record considered as a whole" for the reason that this Court has stated that the power of review of appellate courts under the latter test is even broader than under the "clearly erroneous" test.

The Petitioner would have this Court believe that the Court of Appeals for the Fifth Circuit has absolutely no conception of its task in factually reviewing Labor Board cases brought to it for enforcement.

Indeed, this is not the case, for it is in this circuit that it has been stated:

> "We do not question the settled doctrine that the [Circuit] Court should not, *as a general proposition*, disturb the action of the Examiner and the Board in crediting or discrediting the testimony of a witness." (Emphasis added). *N.L.R.B. v. Walton Manufacturing Company*, 286 F. 2d 16, 22 (5th Cir. 1961).

* * *

> "Presented for our determination are questions as to whether substantial evidence supports the Board's findings. We are not called upon to resolve any novel questions of law. In many instances there is a sharp conflict between the testimony of an employee or former employee of the Newton Company and that of a representative of the company's management as to conversations had. The Trial Examiner has resolved these questions and, for the most part, the Board has followed the Examiner's findings. It is proper that we do likewise *in the absence of compelling reason*. That the Examiner has for the most part credited the testimony of employees and discredited that of management is not among the grounds that might justify our upsetting findings of fact in such situations." (Emphasis added). *N.L.R.B. v. Newton Company*, 236 F. 2d 438, 443 (5th Cir. 1956).

It is obvious from the record that the court below found a "compelling reason" to take the action it did in the instant

case. This is revealed from the following statements by the court below:

"The foregoing references to the Examiner's observations regarding Roberts are not made by reason of any direct bearing which they had upon the issues before the Examiner, the Board and this Court, but because they so clearly disclose the Examiner's views as to the determining of the credibility of witnesses. The Examiner's findings are not to be 'given more weight than in reason and in the light of judicial experience they deserve.' *Universal Camera Corporation v. N.L.R.B.*, * * *" 288 F. 2d at 636.

* * *

"The expressed view of the Examiner that where a person has defected from a union and formed an alliance with the 'opposition', that is to say, with an employer of labor, such person would be unable to give any 'evidence of value', and that such 'alliance' would 'jeopardize any reliance upon him as a witness'. We do not believe we have distorted the Examiner's meaning by taking his words out of context. We think it can fairly be inferred that the Examiner was of the belief that reliance may not be placed upon the testimony of a witness who is a part of the management of an employer in a controversy with a labor union. We think we are required to test the Examiner's credibility findings in the light of his theory of credibility as he had declared it." 288 F. 2d at 637.

* * *

"While the Examiner is not required to apply the maxim, Falsus in uno, falsus in omnibus, the testimony of a careless and inept witness, whose recollection of some matters cannot be accepted, and whose statements are doubted with respect to issues which are not crucial, should, with respect to crucial questions, be more carefully scrutinized than has been done in this case." 288 F. 2d at 638.

This Court seemingly answers the Petition desired in the instant case when it stated:

"Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court [of appeals] shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . . .' Taft-Hartley Act, § 10(e), 61 Stat. 148, 29 U. S. C. (Supp. III) § 160(e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne & Bowler Corp. v. Western Well Works*, 261 U. S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38(5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Ap-

peals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n v. American Tobacco Co.*, 274 U. S. 543, 544." *N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U. S. 498, 502 (1951).

FACTS

In order to find out whether the Court of Appeals "grossly misapplied" the standard of review appropriate in such court, it is well to consider some of the testimony adduced at the trial of this cause.

The testimony in chief to prove the refusal to bargain charge was carried by a Board witness named Wingate. It has been held that the General Counsel must bear the burden of establishing the credibility of his witness by a preponderance of the evidence. *Casa Grande Cotton Oil Mill*, 110 NLRB 1834, 1852 (1954). If the credibility of a witness leaves the issues balanced in doubt, the Complaint should be dismissed. It should be kept in mind that Wingate, as the chief negotiator for the union, was always accompanied by a negotiating committee who were also present at the trial and testified about other matters. Wingate's testimony in regard to the bargaining was never supported by anyone else, even though Respondent at times produced as many as three witnesses to disprove Wingate's testimony. The Board has expressly held an inference of unfavorable testimony when corroborating witnesses are available and are not used in the trial. *Vogue-Wright Studios, Inc.*, 76 NLRB 773, 778 (1948).

Wingate was a contradictory, evasive and confused witness. The Board never made an appraisal of Wingate at all as a witness and it is therefore impossible to comprehend on what basis Wingate's testimony was credited. The Intermediate Report and Board Order conclusively show glowing

discrepancies in Wingate's testimony, yet no reason is advanced by the Trial Examiner nor the Board for accepting Wingate's testimony. *The Board* describes Wingate's conduct and testimony as "inept" and "careless" (R. 77), and at other times accepts the fact that Wingate's versions and incidents are untrue (R. 77). Consider also Wingate's version of the November 23 proposal to the Company. The Board merely stated that Wingate was confused about when he actually furnished this proposal, even though he was claiming that he had done so some two weeks before he actually had furnished the proposal and conceded on cross examination, as the Trial Examiner stated, that "he may have been in error testifying he had called Stephenson on November 15 about a meeting" (R. 80).

This testimony concerned crucial matters since it was charged that the Respondent had failed and refused to negotiate during this period even though requested by the union.

Continuing, let us take the next crucial incident testified to by Wingate involving the private meeting with company representative Stephenson. The Board stated that the meeting was "less complete and definitive than claimed by Wingate" (R. 81), yet Wingate's testimony about the meeting was credited. It has been held that the credibility resolutions of the Trial Examiner and the Board should be reversed where the Board's own finding shows the witness to be unreliable. *Williamson-Dickie Mfg. Co.*, 115 NLRB 356 (1956); *M & S Company, Inc.*, 108 NLRB 1193 (1954); *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950).

The record does not disclose any evidence of anti union animus on the part of the Respondent except an isolated instance that concerned the testimony of Holly and Stephenson on December 25, just after the December 18 meeting.

The Board credits Holly *in toto* about incidents which the record showed could not be true. Holly testified that the employees would receive a retroactive wage increase and a certain cent per hour raise, alleging that this information was given to him by Stephenson on December 25. However, Mr. Walker, the General Manager of the Company, testified that it was his personal decision to give the increase and that the raises were not even considered and decided upon until the following January 4, when it was immediately transmitted to the union. Walker's testimony is unrefuted and uncontradicted, showing that it was impossible for Stephenson to have told Holly this on the Christmas Day previous. The Trial Examiner and the Board casually swept such facts under the rug and based their findings on selected fragmented parts of the evidence.

It is certainly within the purview of the Courts of Appeals to review testimony which shocks the conscience of that Court.

CONCLUSION

For the foregoing facts and reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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July, 1961